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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

JAY PHILLIP GRUND,

Petitioner,

v.

TRACEY ANN SPRINKLE,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether Pro Se Petitioner's Due Process Rights were violated when the trial court failed to give adequate and proper notice to Petitioner of a final hearing to determine his child support obligations.

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JURISDICTION

The Supreme Court of Georgia entered judgment denying Petitioner's Motion for Reconsideration on July 28, 2009 (APP 1). This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law..." U.S.C.A. Const. Amend. 14.

O.C.G.A. § 9-11-40 (c) provides:

> (c) Assignment of cases for trial. The courts shall provide for the placing of actions upon the trial calendar:
> (1) Without request of the parties but **upon notice to the parties; or**
> (2) Upon request of a party and **notice to the other parties.**
>
> Except for cause, cases shall be placed upon the calendar in chronological order in accordance with filing dates. Precedence shall be given to actions entitled thereto by any statute.

Id. (emphasis added).

> O.C.G.A. § 9-11-58 provides in relevant part:
>
> (a) Signing. Except when otherwise specifically provided by statute, all judgments shall be signed by the judge and filed with the clerk. The signature of the judge shall be followed by the spelling of the judge's name and title legibly typed, printed, or stamped.
>
> (b) When judgment entered. The filing with the clerk of a judgment, signed by the judge, with the fully completed civil case disposition form constitutes the entry of the judgment, and, unless the court otherwise directs, no judgment shall be effective for any purpose until the entry of the same, as provided in this subsection.

Id.

STATEMENT OF THE CASE

Factual background and proceedings below[1]

The parties obtained a divorce in 2000. The divorce decree incorporated a settlement agreement which contemplated child support to be equal to twenty-five percent (25%) of Petitioner's gross income, as defined. The Agreement provided that gross income was to be determined "based upon a yearly review of Husband's W-2s on February 15 of each year." (APP 39).

The modification petition,[2] which this appeal concerns, filed *pro se* by Petitioner on December 12, 2005, seeks modification of custody pursuant to the election of the children, designating Petitioner as primary legal custodian of the parties' two (2) sons, JOSHUA PHILLIP GRUND and ZACHARY JOSEPH GRUND, then fourteen (14) and eleven (11) years of age respectively.

Petitioner retained counsel and attorney Mark O. Shriver, IV, filed his Entry of Appearance on January 10, 2006.

A Consent Temporary Order was entered on February 8, 2006 wherein Petitioner was awarded joint primary custody of the eldest child. Joint

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[1] Petitioner has only included the procedural history and orders pertinent to the issue on appeal.

[2] Jay Phillip Grund v. Tracy Ann Sprinkle, Civil Action File Number 05-1-10056-33, Superior Court of Cobb County, Georgia, the Honorable Judge Bodiford presiding.

primary custody of the younger child remained with Respondent.

On April 11, 2006, Respondent filed an Application for Citation for Contempt as a motion within Petitioner's Modification of Custody Proceedings, and not as a separate action. On May 22, 2006, the trial court held a hearing on the Application for Citation for Contempt. During the hearing, the trial court indicated that there would be a status hearing within ninety (90) days to conduct a review of a counseling requirement, and further stated the intent to have a final hearing on June 28, 2006. No document was issued by the trial court reflecting this date. The trial court also mentioned three other dates concerning potential hearings: June 18th, June 30th and an unspecified September date. Petitioner's counsel at that time, Mr. Shriver, agreed to prepare the Order(s) for the Judge.

On June 22, 2006, six (6) days before the final hearing was held, and without having prepared any Orders as he promised the trial court, Mr. Shriver filed a Motion to Withdraw and Notification of Withdrawal as Counsel (APP 22 - 26). Within the Notification of Withdrawal as Counsel was an averment by Mr. Shriver that "Plaintiff JAY PHILLIP GRUND, is hereby notified that there are presently no court dates set in this matter." (APP 25). Mr. Shriver filed contemporaneously a Consent to Withdraw (APP 20) signed by Petitioner which contained the

following averment, "I have been informed by Mr. Shriver that there are presently no court dates set in this matter." (APP 20). Mr. Shriver never prepared the Order(s) from the May 22, 2006 hearing setting the date for the June 28, 2006 Final Hearing.

Therefore, both the trial court and Respondent's counsel had knowledge, as confirmed by the record, that six (6) days prior to the hearing, the then *pro se* Petitioner had been told by his withdrawing counsel, an officer of the court, that no court dates were scheduled in the case.

On June 28, 2006, the trial court apparently held a Final Hearing despite being in receipt of the Motion to Withdraw, Notification of Withdrawal as Counsel and Consent to Withdraw, indicating Petitioner had been advised by his counsel that no hearings were scheduled. At no point did Petitioner receive notice of the hearing from the trial court, nor did the trial court inquire into Petitioner's non-appearance. At the final hearing, Respondent presented and the trial court considered non-W-2 income and hypothetical 2006 rental income in determining an increase to Petitioner's child support obligations. The trial court considered non-W-2 income despite and in contravention of the explicit language in the Settlement Agreement that child support shall be determined based upon a yearly review of the Husband's W-2 income on February 15 of each year.

On June 29, 2006, Petitioner, showing extraordinary diligence, retained the undersigned in anticipation of a future hearing and a Notice of Appearance was filed.

On July 7, 2006, the trial court entered an Order permitting the withdrawal of Mr. Shriver *nunc pro tunc* to June 22, 2006, despite no action by the trial court on that date (APP 17). Petitioner was never served with the Order notifying him that Mr. Shriver's Motion to Withdraw had been granted. Moreover, the Order utilized improper *nunc pro tunc* designation as it supplied an action never made by the court.

On February 18, 2007, the trial court executed the Temporary Order *nunc pro tunc* to May 22, 2006 (APP 15), which memorialized the May 22, 2006 Hearing, and also the Final Order *nunc pro tunc* to June 28, 2006 (APP 10), which memorialized the June 28, 2006 Final Hearing.

Paragraph Two (2) of the Final Order (APP 11) arbitrarily and erroneously used a different formulation to determine Petitioner's child support obligation than the formulation set forth in the Settlement Agreement. The Settlement Agreement required that the amount of child support be "determined based upon a yearly review of his W-2's on February of each year," not an independent assessment of Petitioner's "gross" income, as the trial court concluded in Petitioner's absence.

Paragraph Three (3) of the Final Order (APP 11) incorrectly calculates Petitioner's child support

income based on items which were clearly not "W-2" items. Based on these improperly included items, the trial court granted Respondent an inappropriate and inaccurate award of One Hundred Nine Thousand, Six Hundred Sixty-Six and 75/100 Dollars ($109,666.75). Had the trial court utilized the correct procedures prescribed in the Settlement Agreement, she would in fact have been entitled to nothing ($0.00).

On February 28, 2007, Petitioner filed his Motion to Vacate/for Rehearing. On May 2, 2007, the trial court held a hearing on the Motion to Vacate/For Rehearing.

During the May 2, 2007 hearing, the trial court stated that for many years it had a policy of normally providing written notice to pro se litigants.

On June 27, 2007, the trial court entered its Final Order denying the Motion to Vacate/For Rehearing (APP 7).

Petitioner filed a Motion to Set Aside Judgment on October 1, 2007 pursuant to O.C.G.A. § 9-11-60 (d), based on the constitutional procedural due process issue of lack of notice and an opportunity to be heard. The trial court entered its Order denying Motion to Set Aside Judgment on May 5, 2009 (APP 5).

On June 3, 2009, Petitioner appealed the May 5, 2009 Order denying Motion to Set Aside Judgment to the Georgia Court of Appeals, asserting a violation of procedural due process.

On June 26, 2009, the Georgia Court of Appeals transferred the case to the Supreme Court of Georgia pursuant to Georgia Constitution of 1983, Art. VI, Sec. VI, Par. III (6), giving appellate jurisdiction to the Supreme Court of Georgia over all divorce and alimony cases (APP 3).

On July 17, 2009, the Georgia Supreme Court denied the Application for Discretionary Appeal (APP 2).

On July 28, 2009, the Georgia Supreme Court denied Petitioner's Motion for Reconsideration (APP 1). Petitioner's Motion for Reconsideration was based on constitutional procedural due process grounds for failure to provide Petitioner with notice and an opportunity to be heard.

On September 9, 2009, Petitioner filed his Notice of Intention to Petition for Writ of Certiorari in the Supreme Court of the United States and Motion for Stay/Supersedeas Pursuant to United States Supreme Court Rule 23 and O.C.G.A. § 15-6-9 with the Superior Court of Cobb County, Georgia.

REASONS FOR GRANTING THE PETITION

This case presents a clear opportunity to reaffirm the Procedural Due Process guarantees in the United States Constitution and the requirement of proper and adequate notice to a party before the arbitrary deprivation of one's due

process rights, specifically in the context of a divorce and child custody proceeding.

I. The trial court erred in determining that Petitioner had adequate and proper notice of the June 28, 2006 Final Hearing date in violation of O.C.G.A. § 9-11-40 (c).

The trial court was requested to vacate a Final Order on the grounds that, *inter alia*, Respondent did not have notice of the hearing. It is not disputed that at the May 22, 2006 temporary hearing the trial court announced its intention to conduct a final hearing on June 28, 2006 and also to conduct a review of a counseling requirement within ninety (90) days of the temporary hearing. It is also not disputed that the Temporary Order announced on May 22, 2006, setting the date for the June 28, 2006 hearing, was not executed by the trial court and was not filed in the record until February 18, 2007, *nunc pro tunc* to May 22, 2006, some eight (8) months later.

A. The Temporary Order was not effective until it was signed by the trial court and entered in the record.

That an order is not effective until it is signed by the court is an axiomatic provision of

Georgia Law. The statutory basis is found in O.C.G.A. § 9-11-58 in relevant part as follows:

> (a) Signing. Except when otherwise specifically provided by statute, all judgments shall be signed by the judge and filed with the clerk. The signature of the judge shall be followed by the spelling of the judge's name and title legibly typed, printed, or stamped.
> (b) When judgment entered. The filing with the clerk of a judgment, signed by the judge, with the fully completed civil case disposition form constitutes the entry of the judgment, and, unless the court otherwise directs, **no judgment shall be effective for any purpose until the entry of the same, as provided in this subsection.**

Id. (emphasis added).

Many Georgia appellate cases illustrate this precept. See e.g.: In Interest of R.R., 222 Ga. App. 301, 474 S.E.2d 12 (1996) (trial court's oral pronouncements on the record, while providing appellate insight as to the intent of its subsequent written judgment, are not judgments and what a judge orally declares is not judgment until it has been reduced to writing and entered by the court); Zeitman v. McBrayer, 201 Ga.App. 767, 412 S.E.2d 287 (1991) (until entered in accordance with provision of statute governing entry of judgment,

judgment is inchoate and of no effect for any purpose). See also Bradley v. Tattnall Bank, 170 Ga. App. 821, 318 S.E.2d 657 (1984); Maroska v. Williams, 146 Ga. App. 130, 245 S.E.2d 470 (1978); Bloodworth v. Thompson, 230 Ga. 628, 198 S.E.2d 293 (1973); Williams v. Horn, 124 Ga. App. 485, 184 S.E.2d 198 (1971); Waller v. Waller, 226 Ga. 279, 174 S.E.2d 433 (1970); Herring v. R. L. Mathis Certified Dairy Co., 121 Ga. App. 373, 173 S.E.2d 716 (1970), *appeal dismissed*, 91 S.Ct. 192, 400 U.S. 922 (1970). An oral pronouncement of a future hearing date without a subsequent written notice is not proper and adequate notice under the statute. Therefore, Petitioner had not been properly ordered or noticed by the trial court to return for a hearing, a violation of his due process right to receive notice and an opportunity to be heard. As a result of the determination made in his absence, Petitioner has suffered great financial harm.

B. The record before the trial court clearly indicated that Petitioner was unaware of any pending hearings before the trial court thereby requiring the Judge to inquire into Petitioner's non-appearance.

On June 22, 2006, six (6) days before the final hearing on June 28, 2006 was held, and without having prepared an Order as he promised the trial court, Mr. Shriver filed and served on opposing counsel a Motion to Withdraw. Along with the Motion to Withdraw, he filed a notice that stated in paragraph six (6): "**Plaintiff JAY PHILLIP GRUND, is hereby notified that there are presently no court dates set in this matter.**" (Emphasis supplied) Mr. Shriver contemporaneously filed and served on opposing counsel a Consent to Withdraw, which essentially was a signed and notarized affidavit of Petitioner, and contained in unnumbered paragraph four (4): "**I have been informed by Mr. Shriver that there are presently no court dates set in this matter.**" Both the trial court and Respondent's counsel were therefore aware, six (6) days prior to the orally announced hearing that the *pro se* Petitioner had been specifically told that no court dates were scheduled in the case.[3] The trial court

[3] On July 7, 2006, the trial court entered an Order permitting the withdrawal of Mr. Shriver *nunc pro tunc* to June 22, 2006. The certificate of service accompanying the order

had a duty to inquire into Petitioner's non-appearance at the Final Hearing. The lack of notice appeared on the face of the record and thus the Final Order entered against Petitioner based upon a hearing held without notice to Petitioner is properly subject to a Motion to Set Aside.

A discussion of this point of law is found in Taylor v. Chester, 207 Ga. App. 217, 427 S.E.2d 582 (1993). In Taylor, the Court reversed the denial of a motion to set aside due to the lack of notice to the party as follows:

> As this Court has stated in *Shelton v. Rodgers*, 160 Ga.App. 910, 288 S.E.2d 619 (1982), '[a] judgment or order based upon a trial or hearing entered against a party without notice to that party of the trial or hearing is subject to a motion to set aside where the lack of notice appears on the face of the record.' (Cits.) *Id.* at 911, 288 S.E.2d 619. In this case, as in *Shelton*, the record shows that the trial calendar was sent to an incorrect address and was subsequently returned. It further

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indicates that the Order was served upon Mr. Shriver and Respondent's counsel but not on Petitioner. Petitioner was not formally notified by the trial court that the Motion to Withdraw had been granted. Moreover, as noted above, this Order used an improper *nunc pro tunc* designation because no such pronouncement was ever made on that date and therefore the *nunc pro tunc* designation supplied a non-action in violation of Georgia law.

> appears that the failure of the Petitioner to receive notice of the assignment of the case as required by OCGA § 9-11-40 (c) . . . The clerk had a duty to notify the Petitioner of the assignment of his case to the calendar . . . . **In addition, the judge, through a review of the record, should have been cognizant of the returned calendar when he proceeded with trial. 'Under these circumstances, to hold that this lack of notice to appellant is not a nonamendable defect appearing on the face of the record requiring that the judgment against him be set aside under [OCGA § 9-11-60 (d)] would punish appellant for the oversight of the clerk.' *Shelton v. Rodgers*, 160 Ga.App. at 911, 288 S.E.2d 619.**
>
> As the record in this case shows that there was a total lack of notice to the appellant of the assignment of his case to a trial calendar, we find that the trial court erred in denying the motion.

Taylor, 207 Ga. App. at 219 (emphasis supplied.) As clearly set forth in Taylor, the trial judge in the instant case should have reviewed the record and

should have inquired into Petitioner's non-appearance.

Even greater burdens and duties are placed on the trial court and opposing counsel in domestic relations situations, and the burden is even greater when a party is appearing *pro se*, as Petitioner was following the withdrawal of his counsel. This issue was addressed in Crenshaw v. Crenshaw, 267 Ga. 20, 21, 471 S.E.2d 845 (1996) and in James v. James, 275 Ga. 165, 562 S.E.2d 506 (2002).

In Crenshaw, the Supreme Court of Georgia considered the question of what was adequate notice to a *pro se* party. The question involved the adequacy of notice by publication upon a *pro se* party whose counsel had previously withdrawn. The Supreme Court of Georgia held that:

> The parties to the divorce action must be given a reasonable opportunity to be heard on these issues. Additionally, providing pro se parties with reasonable notice of the final hearing is in keeping with the legislative mandate that the trial court consider all the circumstances and render a decision that furthers the best interest of the children.

Crenshaw, 267 Ga. at 21.

The Georgia Supreme Court determined that the trial court's failure to set aside the judgment under O.G.C.A. § 9-11-60(d) was an abuse of discretion and reversed the trial court. Id. As the

Georgia Supreme Court observed in Green v. Green, 263 Ga 551, 437 S.E.2d 457 (1993):

> [The] spirit of cooperation and civility, when taken together with the notions of fundamental fairness that lie at the heart of the principle of due process of law, requires that attorneys, as officers of the court, make a good faith effort to ensure that all parties to a controversy have a full and fair opportunity to be heard. Such an effort may entail, as is already the customary practice of many attorneys, counsel assuming the burden of notifying by mail any unrepresented opposing party when their case appears on a trial calendar.

Id., at 554-555.

In this case, both the trial court and opposing counsel failed in their duties to provide proper notice of hearing. Further, opposing counsel and the trial court, being fully aware that Petitioner had been informed that no hearing was scheduled, failed to inform Petitioner, upon his counsel's filing of the notice of withdrawal as counsel, of the impending court date.

C. The trial court erred by failing to determine, prior to holding a Final Hearing on June 28, 2006, why Petitioner was not present for the hearing.

At the Motion to Vacate hearing on June 27, 2007, when Petitioner testified that his former attorney had notified Petitioner that no hearing was pending, the trial court summarily dismissed his averment and responded: "**Well, then if that is true, Mr. Grund, and I take that with a grain of salt . . .**" However, had the trial court performed its duty and reviewed the record prior to the final hearing, the trial court would have known it was a true statement rather than summarily questioning Petitioner's veracity. The written proof was directly before it, in the record. Such authority as Green, Crenshaw, Taylor (*supra*), and Shelton v. Rogers, 160 Ga. 910, 288 S.E.2d 619 (1982), all support the proposition that the trial court failed in its duty and that Petitioner suffered a due process deprivation.

II. Georgia law is clear that when a party's counsel withdraws, the statutory notice requirement requires notice to the party; otherwise, an order entered when the party fails to appear is subject to be set aside.

Pretermitting the question of the efficacy of the trial court's announcement at the May 22, 2006 hearing, the record clearly indicates that Petitioner had been subsequently instructed by his counsel at that time that no hearings were scheduled in his case. Petitioner was justified in relying on the averments of his former counsel that no hearings were pending and was not at fault whatsoever or negligent in failing to appear.

Exactly on point is Georgia Highway Express, Inc. v. Whaley, 166 Ga. App. 662, 305 S.E.2d 411 (1983), wherein the Georgia Court of Appeals reversed the trial court's order denying a Motion to Set Aside a default judgment entered when the party failed to answer the call of the case for trial. There, the record showed without dispute that the party's counsel had previously withdrawn from the case and had notified the court. In spite of this fact, the only notice of the trial date was sent to the former counsel who made no effort to inform his former client. The Georgia Court of Appeals held: "The notice provided to former counsel was not sufficient to meet the statutory notice requirements set forth in O.C.G.A. § 9-11-40(c). The

Order denying the Motion to Set Aside is consequently reversed, based on the presence of a non-amenable defect apparent on the face of the record." Id., 166 Ga. App. at 662. Similar to Georgia Highway Express, the record here showed without dispute that Petitioner's counsel had withdrawn from the case and notified the court. Furthermore, the record indicates that the withdrawing counsel misled Petitioner into believing that there were no pending hearings. Notice was not published in the hearing calendar nor was notice sent to either Petitioner or Petitioner's counsel.

Thus, if the notice provided to former counsel in Georgia Highway Express was not sufficient to meet the statutory notice requirement, then clearly the notice given here, which was far more deficient, cannot meet the statutory notice requirement. Georgia law is clear "that failure to receive notice of a final hearing constitutes a nonamendable defect on the face of the record, subject to attack." Murphy v. Murphy, 263 Ga. 280, 430 S.E.2d 749 (1993).

III. The trial court erred by using non-W-2 income attributed to Petitioner to calculate Petitioner's child support, depriving him of his property without due process of the law.

The original settlement agreement entered into between the parties, a bargained for contract

in which the Respondent received valuable Home Depot stock options, provided that Petitioner's child support obligation to the extent that it would exceed Eight Hundred Ninety-Six Dollars ($896.00) per month, was to be calculated based only upon twenty-five percent (25%) of his W-2 income. The Settlement Agreement on Page 11 paragraph (e) provides: "It is further agreed that child support shall equal twenty-five (25%) of the Husband's gross income. **Said amount shall be determined based upon a yearly review of the Husband's W-2's on February 15 of each year."** (Emphasis added).

Nevertheless, in the trial court's Final Order, Petitioner's child support obligation was calculated on the basis of his rental income, interest income, dividend income, short term capital gain and long term capital loss. These are not W-2[4] income items and their use in the calculation was a misapplication of the contract and clear error. This is clear error from which the Petitioner must be granted relief.

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[4] This Court is requested to take judicial notice of the fact that "W-2 income" is a term of art and applies only to wage income.

IV. The trial court erred in using hypothetical 2006 rental income to calculate Petitioner's child support.

The evidence presented to the trial court at the June 28, 2006 hearing consisted of only tax returns from 2004 and 2005. There was no competent evidence presented from which the trial court could determine 2006 rental.[5] Respondent's counsel's gratuitous addition of hypothetical amounts in the order submitted to the trial court was unwarranted and Petitioner is entitled to relief from this clear error.

V. Petitioner never received his right to be heard before the arbitrary deprivation of his property, a fundamental requisite of due process and the Fourteenth Amendment.

By failing to give Petitioner adequate and proper notice pursuant to O.C.G.A. § 9-11-40 (c) and by failing to undertake a reasonable inquiry into Petitioner's absence at the hearing where documents in the record clearly showed a lack of proper notice, the trial court denied Petitioner his right to be heard. "For more than a century, the

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[5] Notwithstanding the fact that rental income is not relevant to the computation of child support under the Settlement Agreement as shown above.

central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1982) (citations omitted). "The right to prior notice and a hearing is central to the Constitution's command of due process." United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Because Petitioner was not given adequate notice, he was deprived of his right to be heard which directly deprived him of his property by arbitrarily increasing his child support obligations to over One Hundred Thousand Dollars ($100,000.00) by using income outside of the Settlement Agreement. This Court has made clear the utmost importance of receiving notice before a deprivation in a domestic proceeding:

> In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. "Many controversies have raged about the cryptic and abstract

> words of the Due Process Clause, but there can be no doubt that, at a minimum, they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U. S. 306, at 339 U. S. 313. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U. S. 457; *Grannis v. Ordean*, 234 U. S. 385; *Priest v. Board of Trustees of Town of Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398."

Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

At the core of this appeal is that the trial court did not afford Petitioner the opportunity to present his objections to the substantively unfair and arbitrary use of non-W-2 income and hypothetical rental income in determining his child support obligation, a clear deprivation of his property and a violation of his Due Process rights.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitution and political history, that we place on a person's right to enjoy what is his, free of governmental interference. [cit.]

...For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long

> been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the cases against him and opportunity to meet it." [cit.]

Fuentes, 407 U.S. at 80-81 (citations omitted). See also James Daniel Good Real Prop., 510 U.S. at 48. Here, the trial court's failure to give notice to Petitioner, resulting in the unfair determination of his child support obligations, violates this high value held dear by this Court and essential to the freedoms enjoyed in this country.

Moreover, the subsequent hearing on the Motion to Set Aside did not resolve the constitutional infirmity resulting from the failure to provide Petitioner notice of the Final Hearing. Due to the swapping of burdens, Petitioner faces an uphill battle of overcoming an adverse decree. This Court continued discussing this point in Armstrong, stating:

> The burdens thus placed upon the petitioner were real, not purely theoretical. For "it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U. S. 513, 357 U. S. 525. Yet these burdens would not have been imposed upon him had he been

> given timely notice in accord with the Constitution.
>
> A fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 234 U. S. 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted.

Armstrong, 380 U.S. at 551-52.

Moreover, Petitioner's right to be heard would only be made meaningful if he had the opportunity to be heard and object before the trial court entered its Order increasing his child support obligations. It is fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. See Hamdi v. Rumsfeld, 542 U.S. 507 (2007).

It should also be noted that basis of the objections, or the lack thereof, have no holding on the right to be heard.

> "To one who protests against the taking of his property without due process of law, it is no answer to say that, in his particular case, due process of law would have led to the same result because he had no adequate defense upon the merits." [cit.] It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome...

Fuentes, 407 U.S. at 87 (citation omitted).

This case concerns the very essence of the liberty provided for in the Constitution; that one should not have his life, liberty or property arbitrarily deprived by the government without first receiving an opportunity to be heard. To remedy this arbitrary deprivation in violation of due process, Petitioner respectfully requests that this Petition for Writ of Certiorari be GRANTED.

Respectfully Submitted,

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